Filed Mar. 24, 1955

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955

No. 12,086

JOSEPH W. BUCHANAN, APPELLANT,

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE.

Before: Edgerton, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's petition for a rehearing in banc in the above entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

Dated: March 24, 1955

Chief Judge Stephens did not participate in the foregoing order.

Circuit Judge Bastian would grant the petition for rehearing in banc.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,086

JOSEPH W. BUCHANAN, APPELLANT

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE

Appeal from the Municipal Court of Appeals
for the District of Columbia

Decided March 3, 1955

Mr. Jo V. Morgan, Jr., with whom *Mr. Duane G. Derrick* was on the brief, for appellant.

Mr. Louis M. Denit, with whom *Messrs. Thomas S. Jackson* and *Richard A. Bishop* were on the brief, for appellee.

Before BAZELON and WASHINGTON, Circuit Judges, and WALTER M. BASTIAN, District Judge, sitting by designation.

BAZELON, *Circuit Judge:* Appellant, the insured under two health and accident policies issued by the appellee, brought suit on the policies in the Municipal Court for the District of Columbia. That suit resulted in a judgment for appellee, which was affirmed by the Municipal Court of Appeals for the District of Columbia,[1] and subsequently we allowed this appeal.

About three months before his sixtieth birthday, appellant became totally disabled by disease and the appellee

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[1] Buchanan v. Massachusetts Protective Ass'n, 102 A. 2d 757 (1954).

duly made payments to him under the policies. But when appellant reached his sixtieth birthday, appellee reduced the payments by fifty per cent. The question is whether such reduction is authorized under the policies. Since the pertinent provisions of the two policies are substantially identical (the chief difference being that one is set up on a weekly basis and the other on a daily basis), it will be sufficient if we confine our discussion to the policy designated as "The Perfection Policy."

The claim is founded upon Clauses "A" and "C" of the policy. Clause "A" provides:

> "*Total Disability from Accident or Disease.* If such injuries or disease result in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability Fifty Dollars per week, as hereinafter limited."

Clause C provides for certain additional payments if the insured is hospitalized or under the care of a registered nurse. The appellee does not question that the disability here comes within the coverage of these clauses of the policy, but it asserts that Clause "N" of the policy effects a fifty per cent reduction in the benefit payments due under Clauses "A" and "C" from the date of the insured's sixtieth birthday. Clause "N" reads:

> "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

But the appellant replies that the reduction is intended to apply only to disabilities arising after age sixty and has no effect upon those arising earlier and continuing thereafter.

The appellee argues, and the court below held, that the language of Clause "N" is unambiguous and leaves no room for construction. To us, however, a provision reducing "all indemnities payable" after age sixty does not—when read in the context here presented—clearly and unambiguously convey that disability benefits already in course of payment are to be affected. The motive for purchasing health and accident insurance is to provide a modest but steady income during periods of disability. It is seriously to be doubted that such insurance could as successfully be sold if the insurance company were to announce to its prospects that at the age of sixty their sustenance was to be cut in half and, we observe, no such suggestion appears in the application form which is part of the policy under Clause "O". The form flatly speaks of a weekly indemnity of $50. To accomplish the fifty per cent vitiation of the contract of insurance which the company seeks, we would insist upon language which unambiguously conveys such an intent to the mind of an ordinary layman. Failing such unambiguous language, doubt should be resolved in favor of the insured.[2]

To be sure, the bare language of Clause "N" can be read as reducing payments on pre-age sixty disabilities. But that clause should not, of course, be "considered alone", as was done by the court below.[3] Clause "A" of

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[2] Stroehman v. Mutual Life Co., 300 U.S. 435 (1937); Phoenix Mutual Life Ins. Co. v. Flynn, 83 U.S. App. D.C. 381, 171 F. 2d 982 (1948). As we said in Hayes v. Home Life Ins. Co., 83 U.S. App. D.C. 110, 112, 168 F. 2d 152, 154 (1948), the customers of insurance companies

> "* * * are, in vast majority, not informed in the obscurities of insurance expertise and not equipped to understand other than plain language. If the companies were permitted to write clear clauses of liability at one point and obscure negations of liability at another, and to maintain successfully the prevalence of the latter over the former, the temptation to sell on one clause and defend on the other would be dangerous."

[3] 102 A. 2d at 758.

the policy undertakes to pay the insured $50 per week during the continuance of certain total disabilities. A rider to the policy, amending Clause "I", undertakes to continue the payments for the life of the insured if the disability occurred before age sixty. Clause "O" provides for an increase in the annual premium from $175 to $205 upon the insured reaching age fifty. Reading Clause "A", the rider, and Clause "O" together, the purport of the policy is that the insured is to be protected for life in case of continuing total disability arising before age sixty and the Company is to be safeguarded against the undeniably greater incidence of disability at advanced ages by the increase in premium rates. A layman, reading Clause "N" against that background, can fairly and reasonably understand it as another provision to safeguard the Company against the increasing incidence of disability. Thus, for the decade between ages fifty and sixty, the Company protects itself by a seventeen per cent increase in premium rate and, for the remainder of the term of the policy between ages sixty and seventy, instead of another increase in premium rate, there is a fifty per cent decrease in coverage, which in effect is a one hundred per cent increase in premium cost. The layman, reading the entire policy, could fairly and reasonably conclude that Clause "N" applies the reduction in coverage only to those disabilities arising after age sixty and that total disability occurring before age sixty enjoys full coverage even though it continues beyond that age.

This construction was placed upon similar provisions involved in the only two decisional authorities referred to by either of the parties. In *Hobson* v. *Mutual Benefit Health & Accident Ass'n*,[4] the insurance clause provided for a monthly indemnity of $100, and the subsequent reduction clause called for progressive reduction of benefits at the rate of ten per cent per year beginning at age fifty-six so that by age sixty monthly benefits would be fifty

[4] 99 Cal. App. 2d 330, 221 P. 2d 761 (1950).

dollars. In *Boillot* v. *Income Guaranty Co.*,[5] the insurance clause called for monthly payments of $100 and the reduction clause provided for a one-third reduction of indemnities accruing after age fifty-five. In both cases, the reduction clause was held to affect only disabilities arising after the specified age, leaving unaffected payments due on account of disabilities commencing earlier. The court below concluded that Clause "N" refers not to *disabilities* occurring after age sixty, but to *payments* then occurring. The word used in Clause "N" is "indemnities". The same word was used in the reduction clause in the *Boillot* case[6] and in the *Hobson* case the word was "benefits".[7] Yet both cases held the provisions to refer only to after-arising disabilities and not to payments for pre-existing disabilities.

We think both the *Hobson* and *Boillot* cases are correct. The court below distinguished them from the instant case because

> "'* * * in those cases the policies contained unequivocal agreements to pay fixed monthly sums and it was held that subsequent clauses, limiting or reducing liability, must fail for repugnancy.'"[8]

In our view this distinction is without substance, since the agreement to pay in the instant case is not less "unequivocal" than the agreements in the cases cited. The court below found the phrase "as hereinafter limited" in the insurance clause (Clause "A") and the phrase "provided by said policy" in the rider prevented the policy in the present case from being an "unequivocal agreement" to pay fixed sums and thus avoided any conflict between those clauses and Clause "N". We note, however, that

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[5] 231 Mo. App. 531, 102 S.W. 2d 132 (1937).

[6] 102 S.W. 2d 132, 143.

[7] 221 P. 2d 761, 763.

[8] 102 A. 2d 757, 758.

the insurance clause in the *Hobson* case included the phrase "subject, however, to all the provisions and limitations hereinafter contained" and the insurance company argued that the phrase should serve to "tie in" the reduction clause with the insurance clause, thereby avoiding the conflict, but the court specifically rejected the argument.[9] In the *Boillot* case, similar language in the insurance clause was held ineffective to subject to reduction payments for pre-existing disabilities.[10]

Nor can the *Hobson* case be distinguished as did the court below on the ground that the first page of the policy stated in large type that the monthly benefits were to be $100. In the instant case there is no such statement in large type, but the application states that the weekly indemnity is $50, without any qualifying or limiting language to suggest that there may be a reduction, and the policy as a whole, as we have said, conveys no contrary impression to the layman reading it. The public policy which dictates resolution of ambiguities in favor of the insured rests upon the need to protect against the opportunity which insurance companies have to engage in the sort of obscurantism which conveys one meaning of their contracts to lawyers and another meaning to laymen.[11]

Reversed.

BASTIAN, Circuit Judge, *dissenting:* I think the judgment appealed from should be affirmed on the opinion of the Municipal Court of Appeals (*Buchanan* v. *Massachusetts Protective Association, Inc.*, 102 A. 2d 757, 82 W.L.R. 594).

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[9] 221 P. 2d 761, 764.

[10] 102 S.W. 2d 132, 144.

[11] Hays v. Home Life Ins. Co., *supra*, note 2.

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 1421

JOSEPH W. BUCHANAN, APPELLANT,

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia,
Civil Division.

(Argued January 11, 1954 Decided February 3, 1954)

Jo V. Morgan, Jr., for appellant.

Louis M. Denit, with whom *Richard A. Bishop* was on the brief, for appellee.

Before CAYTON, Chief Judge, and HOOD and QUINN, Associate Judges.

CAYTON, *Chief Judge:* Appellant is the insured under two health and accident policies issued by appellee insurance company. He became totally disabled by disease within the meaning of the policies and the insurance company paid him periodic indemnities until he became 60 years of age. After that time the company, relying on a provision in the policy, reduced the amount of payments by fifty per cent. The insured sued for the difference, and the trial court having ruled against him, he brings this appeal. The sole question for decision is whether the insured was entitled to full benefits, or half thereof, after age 60.

One contract, "The Perfection Policy," provides for weekly indemnities during periods of disability resulting from disease. The other, called "Daily Benefit Policy," provides for daily payments during such periods. The pertinent provisions of the two policies are substantially identical, and we need refer only to the first-named.

The policy (Part N) provides: "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent." Appellant argues that this provision means that benefits are to be 50% less for disabilities commencing *after* age 60, but that full benefits must be paid for disabilities beginning *before* that age and continuing beyond it.

We think the policy cannot be so construed. It provides no limitation as to disabilities commencing after the insured's sixtieth birthday. It speaks only of indemnities and makes them automatically 50% less at age 60. It seems reasonable to suppose that if it was not intended that there be a reduction at age 60 with respect to already existing disabilities, language indicating that purpose would have been used. We think the quoted language cannot be said to be ambiguous, so as to bring into operation the familiar rule of applying a construction favorable to the insured, and thus adopting his version of the meaning of the words. Considered alone the section is clear and unqualified, and according to it all benefits become 50% less after age 60 without regard to the age of insured at the time he first incurred disability.

Appellant cites *Hobson* v. *Mutual Benefit Health & Accident Ass'n*, 99 Cal. App. 2d 330, 221 P. 2d 761, in support of his construction. The policy there considered was unlike the one before us. It provided without qualification that $100 per month would be paid to insured so long as he lived and suffered disability. In large type on the first page of the policy appeared the words "Monthly Benefits $100.00 Maximum Monthly Benefits $200.00." The court held that "In view of these eye-catching positive statements" a subsequent provision calling for reductions in the monthly payments beginning at age 56 would apply only to disabilities beginning after that age. In the policy before us there are no such positive or unqualified statements.

We next consider whether part N conflicts with other provisions of the policy, so as to create ambiguities which are to be resolved in favor of appellant. Part A provides that the insurer "will pay during the continuance of such disability Fifty Dollars per week, *as hereinafter limited.*" (Emphasis supplied.) Certainly this section does not conflict with part N. On the contrary it is clear that part N was intended as a limitation upon part A, and no reason appears why it should not take effect as such.

A rider attached to the policy provides: "If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks described in Clause I of the attached policy, the weekly indemnity *provided by said policy* shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled . . . ." (Emphasis supplied.) Here again there is no conflict with part N. The rider was for the benefit of the insured, by making the "indemnity provided by said policy" payable for life, instead of terminating completely at age 70, as it would have done except for the rider. The "indemnity provided by said policy" is the amount named in part A as limited by part N.

Appellant relies on *Boillot* v. *Income Guaranty Co.*, 231 Mo. App. 531, 102 S. W. 2d 132, and an alternative holding in *Hobson* v. *Mutual Benefit Health & Accident Ass'n*, *supra*, where somewhat similar provisions were found to be ambiguous. But in those cases the policies contained unequivocal agreements to pay fixed monthly sums, and it was held that subsequent clauses, limiting or reducing liability, must fail for repugnancy. In the case before us there is, as we have seen, no repugnancy between the limiting clause and other policy provisions.

We think we would have to read into the policy ambiguities and conflicts which are not there, and distort its plain intent, in order to adopt the meaning for which appellant contends.

Affirmed.

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

No. M 15037-53

JOSEPH W. BUCHANAN, *Plaintiff*,

v.

THE MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *Defendant*.

Opinion of the Court

The above-entitled matter came on for hearing on October 2, 1953 before the Court without a jury upon the Complaint, Amendment to Complaint and Supplement to Complaint as Amended, and after introduction of necessary exhibits and admissions the Court took the case under advisement.

The undisputed facts are as follows:

Upon written applications duly filed with the defendant insurance company by the plaintiff, two certain policies of insurance were issued to him, No. 359518 known as "The Perfection Policy" and No. 412685, both on March 4, 1924. Attached to each policy and issued on the same date were two riders which provided as follows:

CONTINUOUS DISABILITY RIDER

> If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks described in Clause I (of Policy No. 359518) (beyond the 365 days described in Clause E of Policy No. 412685), the weekly indemnity *provided by said policy* shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled by accident, or similarly disabled and necessarily confined within the house by disease, in either case under the regular care of a licensed physician. *Total disability due to tuberculosis* * * * shall however be construed as confining sickness

hereunder irrespective of whether or not the insured be strictly confined within the house.

In all other respects the terms, provisions, and conditions of said policy remain the same. (Emphasis supplied)

The pertinent provisions of the two policies issued herein are as follows:

POLICY No. 319518

A. TOTAL DISABILITY FROM ACCIDENT OR DISEASE. If such* disease result in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability FIFTY Dollars per week, as hereinafter limited.

I. The weekly indemnity provided for in this policy caused by accidental injuries shall be paid so long as the insured lives and suffers continuous total disability from the date of the accident, otherwise weekly indemnities for disabilities caused by accident or disease shall not collectively cover periods exceeding sixty (60) weeks. * * *

N. The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent.

POLICY No. 412685

A. TOTAL DISABILITY FROM ACCIDENT OR DISEASE. If any* disease results in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability SEVEN Dollars per day, as hereinafter limited.

E. The indemnities provided by this policy, collectively, shall not cover periods of disability exceeding three hundred and sixty-five (365) days in the aggregate.
• • •

I. The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday, unless the policy previously expires under provision E above. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent.

The policy holder (plaintiff herein) reached his 60th birthday on November 21, 1952. Prior to that date he had developed tuberculosis and the insurance company under said policies had been paying him indemnities of $50.00 per week and $7.00 per day but after said date the indemnities were reduced to $25.00 and $3.50 respectively. Premiums have been fully paid by the policy holder to date.

The sole question involved in this case is the construction of the effect of the rider upon each policy in-so-far as the *amounts of indemnity payments* are concerned *after* the insured's 60th birthday.

Plaintiff admits that, if there were no rider to either policy, the plaintiff insured after the age of 60 years would have had his benefits reduced fifty per cent, but contends that, as his total disability was due to disease which occurred prior to his 60th birthday, then the rider only eliminates the 60th birthday from each clause and reserves to him the right to receive benefits at the full weekly and daily rate provided in the total disability clauses.

On the other hand, the defendant insurance company contends that if there were no riders the plaintiff would have received indemnities for time not exceeding 60 weeks (or 365 days in the second policy) at the full rate and then the half rate after his 60th birthday; and that the rider eliminates the 60 week or 365 day limitation as well as

the 70th birthday termination of the policies and makes the indemnity payments continuous as long as the insured lives but at the half rate provided for beyond the 60th birthday.

The Court has considered all the evidence in this case, including the exhibits and the admissions of the parties, either in writing or through their counsel, and has reached the conclusion that a fair and reasonable construction of the policies in the light of their respective riders does not entitle the plaintiff to recover in this case.

The Court is aware that the decisions favor a liberal construction of insurance policies for the benefit of the insured and that any ambiguity must be construed strictly against the insurance company. No citation of cases is required in support of this well recognized principle of law.

In the present case, the Court does not find any ambiguity in applying the language of the riders to the clauses of the policies. It is clear that the provisions of the riders take precedence over those contained in the bodies of the policies and both are to be taken into consideration in the fair and reasonable construction of the terms. In all events, policies of insurance like other contracts must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties.

In the present case the insured developed tuberculosis prior to his 60th birthday on November 2, 1952 which resulted in total disability entitling him indemnity benefits at the rate of $50.00 per week under Policy No. 319518 and $7.00 per week under Policy No. 412685. Without the rider, the insured would have taken a fifty per cent cut in indemnity payments on his 60th birthday and received no payments at all after his seventieth birthday. By the issuance of the supplementary contract (rider), he was entitled to receive indemnity payments for the duration of his life but at the rate provided by the policy, namely,

fixed weekly and daily indemnities to the age of 60 years and fifty per cent of these amounts thereafter for life. In other words, the riders clearly affect the time limits of the policies under total disability situations arising prior to the 60th birthday but do not alter or change the computation of the payments which the insured is entitled to receive and which are fixed by other clauses. The policies set the payments at $50.00 per week and $7.00 per day up to the 60th birthday and thereafter curtailed the payments in half to the 70th birthday, while the riders eliminate the 70th birthday and grant indemnities for life in accordance with the regular computation thereof. The Court is therefore satisfied that the rates of indemnities under the policies are not changed but the limitation of time in which said indemnities are payable have been changed.

Accordingly, the Court concludes that the defendant is entitled to a finding in its favor in the present case. An entry to that effect will be made as of the date of this opinion.

FRANK H. MYERS
Frank H. Myers
Trial Judge

October 6, 1953

Copies mailed to:

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SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1955

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *Petitioner*

vs.

JAMES W. BUCHANAN

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2nd, 1955.

(Sgd) FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of June, 1955